85-1580

No. -

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

BERNARD GIBSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the lower courts incorrectly found probable cause existed to search petitioner's bag.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all the parties.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit was not published and appears in the Appendix below

(hereinafter referred to as "App."). No written opinion was rendered by the United States District Court for the Eastern District of Virginia. However, a copy of the Joint Appendix (hereinafter cited "J.App.") including the District Court's oral oppinion following the suppression hearing and the trial transcript has been forwarded by the Fourth Circuit Court of Appeals pursuant to Supreme Court Rule 19.1.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on December 23, 1985. (App. 1-A). On February 21, 1986, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 23, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the district court rested on 18 U.S.C. Section 3231.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(2) DRUG ABUSE PREVENTION & CONTROL

21 U.S.C. Section 841(a)(1) :

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

STATEMENT OF CASE

The petitioner, Bernard Gibson, was convicted of possession with intent to distribute heroin, in violation of 21 U.S.C. Section 841(a)(1) after Gibson was arrested and his bag was searched at Dulles International Airport in the Eastern District of Virginia on November 14, 1984.

On appeal to this Court, the issue centers on the legitimacy of an alleged narcotic dog's "alert" on Mr. Gibson's luggage.[1/] The challenged arrest occurred

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1/ The facts below are essentially verbatim from the Court of Appeals opinion. Where facts are supplemented they are cited to the Joint Appendix forwarded by the Fourth Circuit Court of Appeals.

shortly after Gibson deplaned. Special Agent McKinney of the Drug Enforcement Administration (DEA) in Washington, D.C., had been notified by a Los Angeles airport detective that a man purchasing an airline ticket at the Los Angeles airport had been behaving suspiciously. Specifically, the detective had said that the man had looked around frequently, that he had rushed to the airline counter, and that he had faced backwards while riding the escalator. The detective had also stated that, according to the airline's records, the man's name was Bernard Gibson, he had paid cash for his ticket, and he was returning to Washington, D.C., after staying in Los Angeles only 90 minutes. The detective also had told McKinney that DEA records had revealed that Bernard Gibson previously had

been convicted of narcotics violations. The detective had given McKinney a physical description of the man, and had stated that the man was carrying a blue garment bag.

Acting upon the Los Angeles detective's information, McKinney and four other DEA agents went to Dulles International Airport and met the flight on which Bernard Gibson was a passenger. When Gibson deplaned he was carrying a blue garment bag. McKinney immediately recognized him, having had several contacts with Gibson during earlier drug trafficking investigations. (J.App. 21,31). In particular, Officer McKinney had stopped Gibson or had him under surveillance on several occasions in 1978-79, but was apparently unsuccessful in his endeavors. Mr. Gibson had also testified as a defense witness in one of McKinney's cases in 1980.

(J.App. 31-32).

After spotting Mr. Gibson, four of the agents, including McKinney, began to follow Gibson through the airport. At the exit, the agents stopped Gibson and asked him to identify himself and indicate from what city he had arrived. Gibson produced his airplane ticket and his driver's license, placing his garment bag on the floor as he did so. Finding nothing out of order, the agents returned Gibson's ticket and the driver's license to him after examining them.

A fifth DEA agent then brought a trained narcotics dog into the vicinity of the garment bag. After the dog had sniffed the bag, Gibson picked up the bag. McKinney informed Gibson that the bag "would have to stay." One of the agents then took the bag from Gibson and again

placed it on the floor.

At this point, the testimony of Mr. Gibson and Officer McKinney conflict. McKinney testified that the dog again sniffed the bag and "stiffened" after which the detective who handled the dog indicated that the dog had "alerted" on the bag and that the handler therefore believed that the bag contained narcotics. (J.App. 44). Mr. Gibson testified the dog never stiffened but rather was preoccupied by a nearby trash can. (J.App. 53). Whichever version is correct, it is clear from Officer McKinney's own testimony the narcotics dog never pointed with his paw at Mr. Gibson's bag in a manner similar to a bird dog. (J.App. 48). However, according to Drug Enforcement Agent Kathleen Martin-Weis "pointing" was this narcotics dog's

normal method of indicating that it detected the scent of narcotics. (J.App. 8).

After the dog's second sniff test McKinney arrested Mr. Gibson. DEA agent Kathleen Martin-Weis then obtained a search warrant for Mr. Gibson's bag based upon her sworn affidavit which implied that the narcotics dog involved had indeed pointed at this bag in its normal alert fashion before Mr. Gibson was arrested or the warrant was sought. (J.App. 8, 9). Based on this affidavit, a United States Magistrate issued a search warrant. (J.App. 4-5). The agents thereafter found heroin when they searched Mr. Gibson's bag.

Mr. Gibson's subsequent motion to suppress the seized narcotics was denied by the District Court for the Eastern District of Virginia. At trial,

Gibson was found guilty of the possession charge based on stipulated facts and Gibson subsequently appealed the denial of his motion to suppress. (J. App. 85).

On appeal of the conviction, the United States Court of Appeals for the Fourth Circuit affirmed, among other things, the District Court finding of probable cause to arrest Mr. Gibson and to seize and search his bag.

REASONS FOR GRANTING THE WRIT

The petitioner, Bernard Gibson, now respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding. This prayer is appropriate in light of the ambiguity existing after United States v. Place, 462

U.S. 696 (1983) as to what weight and under what conditions a narcotics dog's behavior should create probable cause to arrest and search and seize property.[2/]

1. SUSPICIOUS APPEARANCE AND PRIOR CRIMINAL RECORD DO NOT ALONE PROVIDE PROBABLE CAUSE FOR A SEARCH WARRANT TO BE ISSUED

Without the dog sniff test Officer McKinney clearly did not have probable cause to arrest Mr. Gilbert, retain Mr. Gilbert's luggage beyond a temporary detention or obtain a search warrant to search that luggage. While brief investigatory detentions can be supported by a reasonable articulable suspicion, all arrests, whether technical or de facto,

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2/ The relevant issue in Place was whether a dog sniff test constituted a Fourth Amendment search. Place, 462 U.S. at 707. In Place, however, the Supreme Court's endorsement of this drug detection method has logically lead to the issue in Mr. Gibson's case--i.e. when a dog's behavior creates probable cause to search a citizen's luggage.

must be based on probable cause. U.S. Const. Amend. IV; United States v. Watson, 423 U.S. 411, 423-24 (1976) Moreover:

> In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized. Place, 462 U.S. at 707.

Thus, if there was no probable cause to arrest Mr. Gibson in this case, there was also no probable cause to obtain a search warrant to search his luggage.

For probable cause to exist, two conclusions must be supported by substantive evidence at the time the arrest was made. First, there must be probable cause an offense has been committed; second, there must be probable cause that the person arrested committed it.

Beck v. Ohio, 379 U.S. 89, 91 (1964). Whether probable cause is established in a particular case depends upon the facts of each case, and whether a reasonable prudent person, not a legal technician, would act upon those facts. See Brinegar v. United States, 338 U.S. 160, 175 (1949). Importantly, an Officer's subjective suspicion of criminal activity alone is always insufficient to establish probable cause. Id.

While these rules are abstract, this much is clear: probable cause is not established upon mere appearance without some indication that a crime has been committed by the person in question. For example, in Florida v. Royer, 460 U.S. 491 (1983), DEA agents placed the defendant under de facto arrest on the basis of his

nervous appearance and drug courier characteristics including the weight of his luggage and the fact that he bought a ticket to New York, (a "target" city) in cash, under an assumed name. Royer, 460 U.S. at 507. In Royer this Court held that these facts did not establish probable cause to suspect that the defendant had committed a crime justifying his arrest. Id. Otherwise, stated the court:

> Every nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister luggage bags may be arrested and held to answer for a serious felony charge.

Id. at 507.

Similarly, in Beck v. Ohio, 379 U.S. 89 (1964), the defendant was improperly arrested on the basis of his physical appearance and the officer's knowledge that

the defendant had a previous criminal record. Beck, 379 U.S. at 93. This Court held that, while these facts may contribute toward a probable cause finding, they did not establish probable cause by themselves. Beck, 379 U.S. at 97. Otherwise, stated the Court:

> to hold that if either or both of these facts constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will. Id.

In the case at hand, Rover tells us Mr. Gibson's suspicious appearance matching elements of the drug courier profile does not constitute probable cause. Moreover, Beck tells us Mr. Gibson's physical appearance and a prior criminal record will not alone create probable cause. This leaves the narcotics dog's sniff test as the final--and in this case--the decisive factor relied upon to

create probable cause for the agents' actions in this case. (App. 11-12A).

2. THE FACTUAL FINDING OF A POSITIVE DOG SNIFF WAS CLEARLY ERRONEOUS ON THE FACE OF THE RECORD.

The Court of Appeals correctly enunciated the clearly erroneous standard for reversing a district court factual finding. Campbell v. United States, 373 U.S. 487 (1963). In this case, however, the District Court's factual finding of a positive dog alert was clearly erroneous on the face of the record and should have been reversed by the Court of Appeals. In particular, Agent McKinney testified at the suppression hearing that the narcotics dog involved merely appeared to "stiffen" when it was near Mr. Gibson's bag.

Q What did you place him under arrest for?

A Had probable cause to believe that Mr. Gibson was in possession of narcotics.

Q Did he have heroin, marijuana, dilaudid, cocaine?

A At that time I didn't know, but it was narcotics.

Q Because the dog stiffened?

A Yes, sir.

Q And you called it a passive alert?

A Detective Bernier, yes. (J.App. 44)

In contrast Bernard Gibson testified at the suppression hearing that the narcotics dog involved was more interested in a nearby trash can than Gibson's bag.

Q What happened then?

A Then a few minutes later, maybe three, four minutes or so, the dog came, and he took the dog first--

Q The dog handler?

A Yes. And was, like, guiding him, and the dog went on back over, went over to the trashcan.

Q What was the dog doing to the trashcan?

A Sniffing it.

Q Then what happened?

A Then he yanked the dog sat him on top of the bag, and the dog still tried to go for the trashcan. Then that's

when McKinney said, you're under arrest. I say for what? The dog is trying for the trashcan.

Q Describe the dog's behavior. Did he stiffen up?

A No, he didn't. The dog was just moving around, like that. Left out and went over to the trashcan, looked like he was interested in the trashcan. (J.App. 53, 54).

Trying to reconcile the discrepancy between McKinney's and Gilbert's testimony the District Court found:

> He was surrounded then by four agents. He's told at that time he was not under arrest. The dog sniffs. Apparently there is another conflict in the evidence between--Mr. Gibson--the dog sniffs the trashcan; then comes over and sniffs the bag. But, in any event, the dog did conduct two sniffs, and apparently the second one was more positive than the first one. According to Agent McKinney, the dog certainly stiffened, as he noticed on other occasions that the dog would stiffen when narcotics were present, and thus indicated to him that there was narcotics. (J.App. 70-71)

Whichever version of the dog's behavior was correct, none of them conformed to the normal behavior of this dog when detecting narcotics. Indeed, when Kathleen A. Martin-Weis (a DEA special agent who was at the scene of Gibson's arrest) filed a sworn affidavit for a search warrant, she stated:

> The man produced a driver's license identifying him as Bernard Gibson. Mr. Gibson refused a search of his garment bag. Therefore, Detective Bernire"s [sic] trained narcotic detector Canine "Max 25" was utilized. Two years ago Detective Bernier completed a Narcotic Detector Dog Program with the Metropolitan Police Department Canine Branch and upon completion of this program was given "Max 25". "Max 25" has had at least ten confirmed alerts to narcotics including heroin, cocaine, cannibis, and dilaudid. Detective Bernier advised your affiant that "Max 25's" Alert is characterized as a passive response and is illustrated by

> "pointing" in the same manner as a bird dog. "Max 25" has never had a false-positive alert.
>
> Gibson's garment bag was exposed to "Max 25" and Max alerted to the bag. (J. App. 8) (emphasis added).

At the suppression hearing Mr. Sinclair on cross-examination specifically asked Officer McKinney if "Max 25" had alerted in his normal manner by pointing his paw at Mr. Gibson's bag.

> Q So then Brown [another D.E.A. agent at the scene of Gibson's arrest] sat it [Gibson's bag] down for another sniff?
>
> A Agent Brown sat the bag down, and the dog did sniff.
>
> Q This time instead of pawing it a little bit, he also stiffened?
>
> A That's correct.
>
> Q Exactly what did it look like when he stiffened? Did he raise his paw like a point dog, and his tail is out straight, looks straight ahead at a certain point in the bag, like a thing I see in pictures of hunting dogs?
>
> A I don't recall if his tail was pointing, but he stiffened. He wouldn't move one way or the other. His

head was pointed directly toward the garment bag.3/

Thus under either the government's or Mr. Gibson's version of the narcotics dog's reaction to Mr. Gibson's bag, this dog did not act in conformity with his normal "alert" behavior.

The dog's ambiguous reaction is critical because dogs cannot testify as to what they detected in a "sniff test" . A dog's regular and recognized method of signaling the scent of narcotics, therefore, is the only way to obtain a reliable indication that a dog indeed detects the scent of narcotics. For

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3/ Importantly the sworn affidavit giving rise to the search warrant for Mr. Gibson's bag not only failed to mention that "Max 25" had failed to react positively on the first sniff of Mr. Gibson's bag but also clearly implies that this narcotics dog pointed in his normal alert behavior at Mr. Gibson's bag. (J.App. 8).

instance, in Mr. Gibson's case why did the dog's behavior fall short of his normal signal--a bird dog point? Was he merely stretching? Was he actually interested in the odors emanating from a nearby trashcan? Or did he actually smell drugs in Mr. Gibson's luggage? The narcotics dog cannot tell us and its ambiguous actions provide no indication either. Importantly, in United States v. Place, 462 U.S. 696 (1983), where this Court indicated that a narcotics dog sniff test was appropriate, DEA agents did not seek a search warrant for the larger of two bags held when a trained narcotics detection dog reacted ambiguously to it. Place, 462 U.S. at 699. These agents only applied for and secured a search warrant for a smaller bag to which the narcotics dog had clearly reacted with

a positive alert. Similarly, in United States v. Williams, 726 F.2d 661 (10th Cir. 1984), cert. den. 104 S. Ct. 3523 (1984), a positive dog sniff creating probable cause was found where narcotics dog alerted in his normal fashion by scratching and biting the suspect luggage. The importance of both of these cases to the case at bar is the predictable alert behavior the narcotics dog exhibited which gave an indicia of reliability to a positive dog sniff finding. The problem in this case is not that "Max 25" did not bite or scratch Mr. Gibson's luggage similar to the narcotics detection dog in Williams, or that "Max 25" did not signal Officer Bernier the same way the narcotics dog in Place signaled his dog handler. Rather, the problem is that "Max 25" did not react the

way he normally did when he detected a narcotic scent and yet this dog's ambiguous reaction was seized upon by DEA officers to create probable cause to arrest Mr. Gibson's and to obtain a search warrant for Mr. Gibson's bag.

Under proper conditions use of well trained narcotics dogs provides a less intrusive alternative to the search of a citizen's luggage and is a welcomed development in drug enforcement. Place, 462 U.S. at 707. In this case, however, to allow the Court of Appeals decision to stand would not only be unfair to Mr. Gibson--who's property seizure was fatally defective without a legitimate dog alert--but also reflects a deeper problem of allowing agents to create probable cause based upon their subjective opinion as to a

dog's ambiguous behavior without any objective limitations on their findings.

As this Court pointed out in Steagald v. United States, 451 U.S. 204 (1981), when it required a neutral and detached magistrate to determine the existence of probable cause, "an officer engaged in the often competitive enterprise of ferreting out crime...may lack sufficient objectivity to weigh correctly the strength of evidence...against the individual's interest in protecting his own liberty." Id. at 212 (quoting Johnson v. United States, 333 U.S. 10,14 (1948)); See also, Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) (prosecutors and police "simply cannot be asked to maintain the requisite neutrality" regarding their own often competitive investigations);

McDonald v. United States, 335 U.S. 451, 455-56 (1948) ("police acting on their own cannot be trusted" to respect Fourth Amendment rights of privacy).

In this case the benefit of a neutral and detached magistrate was undermined by a misleading affidavit implying the narcotics dog had alerted in its recognized fashion. This left officers at the scene as the only real arbiter of the existence of probable cause--a responsibility they "simply cannot be asked" to objectively perform.

This Court, therefore, needs to prohibit law enforcement officers from using an ambiguous sniff test to create probable cause.

CONCLUSION

For the foregoing reasons, the Petition For A Writ of Certiorari should be granted to review the judgment of the court of appeals.

Respectfully submitted,

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February 21, 1986

APPENDIX

ITEM

1. Court of Appeals Opinion, December 23, 1985.....1A

Note: Pursuant to Supreme Court Rule 19.1 a copy of the Joint Appendix is being forwarded by the Fourth Circuit Court of Appeals in conjunction with this Petition.

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(UNPUBLISHED) No. 85-5077

United States of America,

Appellee,

versus

Bernard Gibson,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (Cr. No. 84-00242-A

Submitted: October,31 1985 Decided: December 23, 1985

Before RUSSELL, HALL and SPROUSE, Circuit Judges.

(J. Frederick Sinclair, Cohen, Dunn & Sinclair, P.C., on brief) for Appellant. (Elsie L. Munsell, United States Attorney, Kenneth E. Melson, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

Bernard Gibson appeals his conviction for possession with intent to distribute heroin, in violation of 21 U.S.C. Section 841(a)(1). Gibson assigns as error the denial of his motion to suppress evidence obtained as the result of an investigative stop and arrest. For the reasons given below, we affirm the judgment.

The challenged stop and arrest occurred on November 14, 1984, at Dulles airport in the Eastern District of Virginia shortly after Gibson deplaned. Special Agent McKinney of the Drug Enforcement Administration (DEA) in Washington, D.C., had been notified by a Los Angeles airport detective that a man purchasing an airline

ticket at the Los Angeles airport had been behaving suspiciously. Specifically, the detective had said that the man had looked around frequently, that he had rushed to the airline counter, and that he had faced backwards while riding the escalator. The detective had also stated that, according to the airline's records, the man's name was Bernard Gibson, he had paid cash for his ticket, and he was returning to Washington, D.C., after staying in Los Angeles only 90 minutes. The detective also had told McKinney that DEA records had revealed that Bernard Gibson previously had been convicted of narcotics violations. The detective had given McKinney a physical description of the man, and had stated that the man was carrying a blue garment bag.

Acting upon the Los Angeles detective's information, McKinney and four other DEA agents went to Dulles

International Airport and met the flight on which Bernard Gibson was a passenger. When Gibson deplaned, McKinney, who had encountered Gibson during several earlier drug trafficking investigations, immediately recognized Gibson. Gibson was carrying a blue garment bag.

Four of the agents, including McKinney, began to follow Gibson through the airport. At the exit, the agents stopped Gibson and asked him to identify himself and indicate from what city he had arrived. Gibson produced his airplane ticket and his driver's license, placing his garment bag on the floor as he did so. The agents returned Gibson's ticket and the driver's license to him after examining them. A fifth DEA agent then brought a trained narcotics dog into the vicinity of the garment bag. After the dog had sniffed

the bag, Gibson picked up the bag. McKinney informed Gibson that the bag "would have to stay." One of the agents took the bag from Gibson and again placed it on the floor. the dog again sniffed the bag, after which the detective who handled the dog indicated that the dog had "alerted" on the bag, and that the handler therefore believed that the bag contained narcotics. McKinney thereupon arrested Gibson. The agents then obtained a search warrant for the bag, searched the bag, and found a substantial quantity of heroin in it.

Gibson's first allegation of error is that the investigative stop violated the Fourth Amendment proscription against unreasonable seizures. We will assume without deciding that Gibson was "seized" within the meaning of the Fourth Amendment. Consequently, we will not

inquire into whether Gibson reasonably could have believed that he was free to leave, within the meaning of United States v. Mendenhall, 446 U.S. 544 (1980). We will, instead, focus on whether the stop was justified by an articulable, reasonable suspicion that Gibson was involved in criminal activity. Florida v. Rodriguez, ____ U.S. ____, 53 U.S.L.W. 3359 (Nov. 13, 1984); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968). We believe that the stop was so justified.

A description matching a "drug courier profile," without more, does not provide sufficient grounds for reasonable suspicion justifying an investigative stop. Reid v. Georgia, 448 U.S. 438 (1980). However, nothing in Reid, supra, prevents law enforcement officials from basing a

reasonable suspicion on a drug courier profile plus other cogent factors. This Court has specifically approved such a standard in United States v. Harrison, 667 F.2d 1158 (4th Cir.), cert. denied, 457 U.S. 1121 (1982), and United States v. Corbin, 662 F.2d 1066 (4th Cir. 1981). In Corbin, supra, the suspects, who had certain characteristics of drug couriers, lingered in the airport and delayed retrieving their baggage. The suspects also engaged the federal agents in conversation. The stop occurred only after one of the suspects headed toward a restrooom with an item taken from their baggage. In Harrison, supra, federal agents, in addition to noting that the suspect exhibited certain characteristics of drug couriers, saw a long bulge on the suspect's back underneath his jacket before they stopped him.

If the stop of Gibson had been based only on Gibson's apparent nervousness, his carrying of minimal luggage, and his arrival from a city known to be a source of narcotics, all of which are merely general drug courier characteristics, the stop would not have been justified. The stop, however, was based also on the fact that Gibson had been recognized by McKinney as a suspect and participant in former drug trafficking. We have found analogous factors to be grounds for reasonable suspicion. For example, in United States v. Porter, 738 F.2d 622 (4th Cir.), cert. denied, _____ U.S. _____, 53 U.S.L.W. 3342 (Nov. 5, 1984), we found an anonymous informant's tip, containing a description of the passenger said to be carrying drugs, to be an adequate basis for a Terry stop. Our holding in United

States v. Gooding, 695 F.2d 78 (4th Cir. 1982), finding no objective basis for reasonable suspicion, is distinguishable from the instant case. In Gooding, the only behavior aside from the drug courier profile that was advanced to support reasonable suspicion was that the suspect made several telephone calls, appeared vexed upon receiving no answer to his calls, and ate a meal in the airport restaurant. We conclude that the stop in this case was based on a reasonable articulable suspicion within the meaning of Terry.

We also think that the level of intrusion and length of detention were appropriate under the circumstances. Gibson was detained in an open area near the airport exit. The district court made a factual finding that the detention, prior to the arrest, lasted no more than ten

minutes. In the absence of clear error we will not disturb this finding. Campbell v. United States, 373 U.S. 487 (1963); United States v. Lawrenson, 298 F.2d 880, 887 (4th Cir.), cert. denied, 370 U.S. 913 (1962). The level of intrusion here is substantially lower than that disapproved by the Supreme Court in Florida v. Royer, 460 U.S. 491 (1983), in which the police had detained a suspect in a small room, after having taken his identification and airline ticket and having seized his luggage from the airline, without explaining when and how he might retrieve those items. We conclude that the stop of Gibson was no more intrusive than is permitted in a Terry stop.

Gibson's second allegation of error is that the narcotics dog's behavior, upon sniffing the garment bag, did not

provide probable cause for an arrest. Specifically, Gibson's contention is that the dog's "passive alert" was not the "classic alert behavior," United States v. Williams, 726 F.2d 661 (10th Cir. 1984), consisting of scratching and biting of luggage containing narcotics, which is expected of a narcotics dog. The district court, however, made a specific finding that "it was a positive dog sniff." We cannot say, on the record before us, that this finding is clearly erroneous. Campbell, supra; Lawrenson, supra. Agent McKinney testified that he made the arrest after the dog's handler indicated that the dog had made a positive alert. McKinney testified that the dog stiffened briefly after the first sniff, and stiffened more markedly during the second sniff. We are not persuaded that Williams, supra, establishes a rigid standard for a

narcotics dog's alert. We believe that the district court was entitled to take into account the possibility that different narcotics dogs may alert in a different manner. In general, the case law approving the use of narcotics dogs does not explicitly provide that a dog must exhibit certain behavior before probable cause may be established. See United States v. Place, 462 U.S. 696 (1983); United States v. Borys, 766 F.2d 304 (7th Cir. 1985). Although Gibson's version of the dog's behavior differs from McKinney's version, the district court judge found McKinney to be more credible than Gibson. We cannot disturb the trial judge's finding on credibility. Jelaza v. United States, 179 F.2d 202, 204 (4th Cir. 1950). Therefore, accepting the district court's finding that the narcotics dog made a positive alert on

the garment bag, we decide that McKinney had probable cause to arrest Gibson for possession of narcotics.

For the reasons given above, we conclude that Gibson's allegations of error are without merit. Because the dispositive issues recently have been authoritatively decided, we dispense with oral argument and affirm the judgment.

AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition For A Writ of Certiorari were mailed, first class, postage pre-paid this 24th day of March, 1986 to the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

J. Frederick Sinclair

J. FREDERICK SINCLAIR